Office - Supreme
FILED
JUL [illegible] 1982
[illegible] L. STEVAS,
[illegible] CLERK

No. 81-2338

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF APPELLEE TAXATION WITH REPRESENTATION OF WASHINGTON

John Cary Sims
(*Counsel of Record*)

Alan B. Morrison
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Thomas F. Field
6830 North Fairfax Drive
Arlington, Virginia 22213
(703) 532-1850

Attorneys for Appellee
Taxation with Representation
of Washington

July 23, 1982

THE CADILLAC PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 833-1200

TABLE OF AUTHORITIES

Cases **Page**

Bob Jones University v. Simon,
416 U.S. 725 (1974) 2

Buckley v. Valeo,
424 U.S. 1 (1976) 5

Cammarano v. United States,
358 U.S. 498 (1959) 5-6

Carey v. Brown,
447 U.S. 455 (1980) 5, 6-7

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 102 S.Ct. 434 (1981) 5

First National Bank of Boston v. Belloti,
435 U.S. 765 (1978) 5, 7

Policy Department v. Mosley,
408 U.S. 92 (1972) 5, 7

United States v. O'Brien,
391 U.S. 367 (1968) 5

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 6

Zobel v. Williams,
___ U.S. ___ (June 14, 1982) 7

Statutes:

Internal Revenue Code (Title 26, United States Code):

Section 162(e) 6
Section 170(c) 2
Section 501(c) ..... *passim*

Section 501(c)(4) 3
Section 501(c)(8) 3
Section 501(c)(10) 3
Section 501(c)(19) 3
Section 2055 ..... 2, 3
Section 2106 2
Section 2522 ..... 2, 3
Section 7428 2

Rules of Court

Supreme Court Rule 16.1(c) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-2338

DONALD T. REGAN, SECRETARY OF THE TREASURY, *et al.*,

Appellants,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM OF APPELLEE TAXATION WITH REPRESENTATION OF WASHINGTON

This memorandum is submitted by appellee Taxation with Representation of Washington* ("Taxation") to state its position regarding the jurisdictional statement filed by appellants Donald T. Regan, Secretary of the Treasury, Roscoe L. Egger, Jr., Commissioner of Internal Revenue, and the United States of America (hereinafter referred to as the "government"). In addition to filing this response to the government's appeal, Taxation is docketing a cross-appeal stating two additional questions which are closely related to the question raised by the government.

*Appellee Taxation with Representation of Washington has no parent companies, subsidiaries, or affiliates within the meaning of Rule 28.1.

1. Taxation is a nonprofit organization which was formed for the purpose of representing the general public when tax issues are being considered by Congress, the Executive Branch, and the courts (2a).[1] However, Taxation was denied a tax exemption under section 501(c)(3) of the Internal Revenue Code (the "Code") because it does not meet the statutory requirement that "no substantial part" of its activities consist of "attempting to influence legislation" (3a). The organization then filed a declaratory judgment action under 26 U.S.C. § 7428, contending that the statutory restriction on its lobbying violated the First Amendment and the equal protection guarantee of the Fifth Amendment. This challenge to the constitutionality of section 501(c)(3) was eventually heard by the United States Court of Appeals for the District of Columbia Circuit sitting *en banc,* and the decision rendered by that court is reported at 676 F.2d 715 (11a-121a).

The court of appeals held, by a vote of 7-3, that section 501(c) is unconstitutional because it denies Taxation and other charities the equal protection of the laws. The principal disparity in treatment with respect to lobbying which was analyzed by the court of appeals concerns an organization's right to receive contributions which are tax-deductible to the donor. A section 501(c)(3) organization may receive such gifts, which are often a prerequisite to successful fund raising, only if it does not engage in substantial lobbying. Code §§ 170(c)(2) (income tax); 2055(a)(2), 2106(a) (estate tax); 2522(a) (gift tax). *See Bob Jones University v. Simon,* 416 U.S. 725, 729-30 (1974). On the other hand, veterans' organizations may receive tax-deductible contributions no matter how much lobbying they conduct, or on what subjects (23a). *See* Code

[1]Citations in the form "____a" refer to the appendix to the government's jurisdictional statement.

§§ 501(c)(19); 170(c)(3); 2055; 2522.[2] The court of appeals summarized the effect of the statutory provisions as follows:

> For the purposes of this case, the crucial distinction promoted by Section 501 is between organizations that may not receive tax-deductible contributions if they lobby substantially, and organizations that may receive such contributions even if they do.
>
> * * *
>
> An organization such as Taxation may not receive tax-deductible contributions if it engages in "substantial" lobbying, but a qualifying veterans' organization may continue to receive tax-deductible contributions even if it lobbies as much and on as many issues as it chooses.

(17a, 23a). The court found that this discrimination is unconstitutional:

> [T]he Code's discriminatory treatment of lobbying by veterans' organizations does not even satisfy the test of rationality, much less the heightened level of scrutiny appropriate here. The legislative history of the tax exemptions accorded veterans demonstrates absolutely no governmental interest whatsoever that is served

[2] Some veterans' groups are tax-exempt under section 501(c)(4) rather than section 501(c)(19), but under the terms of section 170(c)(3) they still qualify to receive tax-deductible contributions. An organization exempt under section 501(c)(4) which is not an "organization of war veterans" cannot receive tax-deductible contributions. Fraternal societies are accorded tax treatment which is only slightly less favorable than that of veterans' groups. Code §§ 501(c)(8); 501(c)(10); 170(c)(4); 2522.

> by allowing such groups to conduct substantial lobbying with tax-deductible contributions.

(66a).

2. Taxation agrees with the government that the court of appeals' equal protection holding raises a substantial and important question which merits plenary review by this Court. Taxation believes that the decision below is correct, but it does not contend "that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." S. Ct. Rule 16.1(c). Moreover, as indicated in the jurisdictional statement on cross-appeal filed by Taxation, there are two additional questions which are both closely related to the equal protection issue and substantial enough to merit consideration in conjunction with this appeal. Taxation's cross-appeal requests that this Court (1) consider what the proper remedy should be if the court of appeals' equal protection holding is affirmed, and (2) consider Taxation's alternative First Amendment theory, which was not adopted by the court of appeals. The reasons supporting this Court's consideration of these additional questions are given in Taxation's separate jurisdictional statement on cross-appeal, and will not be repeated here.

3. Although the government correctly describes the constitutionality of sections 501(c) and 170(c) as raising "an important question that should be decided by this Court" (Jurisdictional Statement at 22), its attack on the correctness of the holding of the court of appeals is out of step with the doctrines this Court has developed in equal protection cases which implicate First Amendment rights. Perhaps the most glaring deficiency in the government's jurisdictional statement is its insistence that the challenged classification should be measured against the "rational

basis" standard of review. Jurisdictional Statement at 12. Significantly, the government does not even assert that the classification could be sustained under the heightened standard of review applied by the court of appeals.

The court of appeals was plainly correct in finding that a heightened standard of review should be applied because the lobbying restriction implicates the exercise of First Amendment rights. In directing its inquiry to the questions of "whether the discriminatory framework of Section 501(c) serves a substantial governmental interest and whether the statute is narrowly tailored to serve that end" (45a), the court of appeals followed the standard which this Court has repeatedly applied when fundamental rights protected by the First Amendment are being regulated. *See, e.g., Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley,* 102 S. Ct. 434, 436 (1981); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978); *Buckley v. Valeo,* 424 U.S. 1, 25, 64-65, 93-96 (1976); *United States v. O'Brien,* 391 U.S. 367, 377 (1968). Because lobbying is undoubtedly protected by the First Amendment guarantees of free speech, association, and petition, the statutory classification is one which impinges on the exercise of a fundamental right (29a, 89a). Accordingly, a very demanding standard of review is appropriate. *Carey v. Brown,* 447 U.S. 455 (1980); *Police Department v. Mosley,* 408 U.S. 92 (1972).

4. The court of appeals held that the classification challenged by Taxation "does not even satisfy the test of rationality, much less the heightened level of scrutiny appropriate here" (66a). In arguing that the statute measures up to the rationality standard, which it asserts is the appropriate one, the government relies primarily on *Cammarano v. United States,* 358 U.S. 498 (1959), and the policy of "neutrality" toward lobbying which that decision

is said to approve. *See id.* at 513. However, *Cammarano* approves only the nondiscriminatory denial of tax support for lobbying, on the theory that "everyone in the community should stand on the same footing" with respect to lobbying. *Id.* As detailed by the court of appeals, Congress substantially altered its policy toward lobbying in 1962 when it added section 162(e) to the Internal Revenue Code, thereby authorizing deductions for most business-related lobbying (46a-48a, 63a-64a).

The government makes several references to another policy which it says supports the lobbying restriction — that of "preventing abuses of charitable lobbying by private interests". Jurisdictional Statement at 16; *see id.* at 10-11. The court of appeals correctly found that this asserted interest could not in any way justify the preferred treatment granted veterans' groups, since there "is no evidence whatsoever that the lobbying of veterans is less subject to abuse by private interests than that of other Section 501(c) groups" (64a-65a).

5. The government argues that Congress may attack a problem one step at a time. Jurisdictional Statement at 16-18. That may be true in many contexts, but when First Amendment interests are at stake, it must be shown that even the initial steps are "narrowly drawn regulations designed to serve [governmental] interests without unnecessarily interfering with First Amendment freedoms." *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637 (1980). *Carey v. Brown, supra,* provides another illustration of the application of this principle. There, this Court recognized that the "State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." 447 U.S. at 471. However, the Court recognized that "even the most legitimate goal may not be

advanced in a constitutionally impermissible manner," and it invalidated the statute in question because it discriminated among pickets based on the subject matter of their expression. *Id.* at 464-65, 471.

6. The government also attempts to support the challenged classification by pointing out that veterans' organizations "are composed principally of war veterans to whom the nation owes special gratitude for enduring the peril and disruption of civil pursuits associated with wartime service in the Armed Forces." Jurisdictional Statement at 19. While this consideration may justify the provision of many types of benefits to veterans, it does not authorize the use of First Amendment rights as a type of currency to reward those who have rendered service. "The First Amendment proscribes governmental efforts to favor one speaker over another" (67a). *See, e.g., Carey v. Brown, supra,* 447 U.S. at 462-63; *First National Bank of Boston v. Bellotti, supra,* 435 U.S. at 784-85; *Police Department v. Mosley, supra,* 408 U.S. at 96. *See also Zobel v. Williams,* ____ U.S. ____ (June 14, 1982).

Finally, the government asserts that "Congress has not in fact given veterans' organizations carte blanche authority to lobby with tax-deductible contributions." Jurisdictional Statement at 21. In support of this proposition, reference is made to certain statutes which prohibit veterans' groups from engaging in partisan political activity. *Id.* at 21-22; *see* 116a-117a. However, those statutes have no relevance whatever to this case, since they regulate only partisan political activity, not lobbying. In fact, section 501(c)(3) organizations are also explicitly prohibited from engaging in any political activity, and that restriction has not been challenged in this action. *See* Code § 501(c)(3) (a charity may not "participate in, or intervene in (including the publishing or distributing of statements),

any political campaign on behalf of any candidate for public office"). Thus, the only significant difference between veterans' groups and other charities is that only the former are unrestricted in their ability to lobby.

CONCLUSION

This case raises a substantial question which should be briefed by the parties and argued before this Court.

Respectfully submitted,

John Cary Sims
(*Counsel of Record*)

Alan B. Morrison
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Thomas F. Field
6830 North Fairfax Drive
Arlington, Virginia 22213
(703) 532-1850

Attorneys for Appellee
Taxation with Representation
of Washington

July 23, 1982